NO. 82-1711

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF COLORADO,
Petitioner,

vs.

FIDEL QUINTERO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Colorado Supreme Court mistakenly interpreted the Fourth Amendment's prohibition against unreasonable search and seizure when it applied the exclusionary rule to an undisputed good-faith seizure of stolen property.

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OPINION BELOW

The opinion of the Colorado Supreme Court is included as Exhibit "A".

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Writ of Certiorari to the Supreme Court of Colorado is here sought to review the judgment and opinion in The People of the State of Colorado v. Fidel Quintero, 657 P.2d 948 (Colo. 1983).

This case involved an interlocutory appeal by the People of the State of Colorado, (hereafter referred to as "the People" or "the Prosecution").

Colorado Appellate Rule 4.1(g) Exhibit "B" in the appendix to this Petition, specifically prohibits a petition for rehearing on interlocutory appeals in criminal cases.

Hence, on the same day that it issued its opinion, January 31, 1983, the Colorado Supreme Court also issued an order of remittitur to the trial court.

On February 16, 1983, the People filed a motion to vacate remittitur, Exhibit "C" to this petition. On February 22, 1983, this motion was denied and the judgment thereupon became final.

The trial court has stopped proceedings concerning this case pending filing of this Petition for Writ of Certiorari.

2. The jurisdiction of this Court is invoked pursuant to Rule 17(1)(c) of the Revised Rules of the Supreme Court of the United States, which provides that a review on writ of certiorari may be considered "when a state court or a federal court of appeals has decided an important question of federal

law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." U.S. Sup. Ct. Rule 17(1)(c), 28 U.S.C.A.

The date of the Colorado Supreme Court's opinion in the interlocutory appeal was January 31, 1983. The date of the Order that denied the People of the State of Colorado's Motion to Vacate Remittitur is February 22, 1983. Pursuant to U.S. Sup. Ct. Rule 20(1), 28 U.S.C.A., "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment."

CONSTITUTIONAL PROVISION INVOLVED IN THE SUBJECT CASE.

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

CONCISE STATEMENT OF MATERIAL FACTS

On September 29, 1981, at 12:45 p.m., Darlene Bergan was sweeping her porch at 691 South Vine Street, Denver, Colorado. She saw the defendant go up on the porch of a house across the street from her and peer into the front door and the front window for approximately twenty seconds each. He then left the porch, walking north and looked at the side of the house. Mrs. Bergan thought he was acting strangely and watched him continue walking north until he crossed the street and disappeared from her sight.

Mrs. Bergan saw the defendant again about 40 minutes later standing at the bus stop in front of her house. He had taken off his short sleeved shirt and thrown it over a television set. Defendant was pacing nervously and trying to hitchhike while waiting for the bus.

Mrs. Bergan called the police, and the radio dispatcher reported a possible burglary suspect at the bus stop at Vine and Exposition, wearing a T-shirt and with a television set covered with a shirt.

Officer Freeman, a Denver police officer for 21 years, arrived within 5 minutes of the call; saw the defendant waiting by the bus stop in his undershirt; and asked him for identification. The defendant had no identification and claimed that he had paid

someone in the neighborhood $100 for the television.

Other officers arrived within 2-3 minutes, and Mrs. Bergan made herself known to the officers as the person who had called the police and reported what she had seen. After Mrs. Bergan identified herself, the defendant was arrested and searched. Although it was a hot day, with the temperature in the 80 degrees, the officers found a pair of brown wool gloves in defendant's back pocket. Under the shirt was a television set and video game. The police also found $139 in cash; 5 rings, including 2 class rings with different initials and class years; and, some ladies jewelry when defendant was searched at police headquarters

Later that day, David and Carol Rogers reported their house at 791 South Vine, Denver, Colorado, had been burglarized and a television set and video game stolen. They identified the television set and video game recovered from the defendant as the items taken in the burglary.

The defendant was charged by information with second degree burglary. In a trial to the court, the court considered the trial evidence to determine both guilt and defendant's motion to suppress evidence seized at the time of his arrest. The trial

court found defendant guilty of second degree burglary and denied the motion to suppress. Thereafter, the trial court granted defendant's motion for new trial and his motion to suppress, because of People v. Schreyer, 640 P.2d 1147 (Colo. 1982).

The prosecution took an interlocutory appeal from the trial court's ruling to the Colorado Supreme Court, specifically requesting a review of the trial court's suppression of the television set, video game and gloves.

The Colorado Supreme Court affirmed the ruling of the trial court (see Exhibit "A"). The Colorado Supreme Court found that although the arresting officer "believed that probable cause existed to arrest Quintero", the good faith exception to the exclusionary rule could not remedy a violation of the Fourth Amendment, because the United States Supreme Court had not yet recognized such an exception, citing Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982).

The Colorado Supreme Court decision was made notwithstanding §16-3-308, C.R.S. 1973 (1982 Cum. Supp.), adopted by the Colorado Legislature in 1981 and effective July 1, 1981, which renders evidence admissible when seized as the result of a "good faith mistake."

ARGUMENT

This Petition for Writ of Certiorari, therefore, is requested to resolve the issue whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), may be modified by duly enacted state statute so as not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure was consistent with the Fourth Amendment.

The following section demonstrates why this question should be settled by this Court.

6. The Colorado Supreme Court has relied in its decision upon Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982), where this Court declined to recognize a "good faith" exception to the exclusionary rule. Although Colorado has enacted a statute which provides for such an exception, the Colorado Supreme Court held that it would be inappropriate "to alter established Fourth Amendment doctrine by approving such an exception at this time", in light of Taylor v. Alabama, supra.

The majority of the United States Supreme Court has not recognized a good faith exception to date, but several Justices have

urged the adoption of a good faith exception to the exclusionary rule. E.g., Stone v. Powell, 428 U.S. 465, 538, 96 S.Ct. 3037, 3073, 49 L.Ed.2d 1067 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 610-12, 95 S.Ct. 2254, 2265-66, 45 L.Ed.2d 416 (1975)(Powell, J., concurring).

The issue of whether the exclusionary rule should be modified by a good faith exception is presently before this Court in Illinois v. Gates No. 81-430, with one major distinction:

Illinois state law supported suppression of the evidence, whereas the Colorado General Assembly has enacted §16-3-308, C.R.S. 1973 (1982 Cum. Supp.), which provides in pertinent part:

> 16-3-308. Evidence - admissibility - declaration of purpose. (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901(3)(l), C.R.S. 1973, as a result of a good faith mistake or of a technical violation.
> (2) As used in subsection (1) of this section:
> (a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.
> * * *
> (4) It is hereby declared to be the

> public policy of the state of Colorado that when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, that it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible. This section is necessary to identify the characteristics of evidence which will be admissible in a court of law. This section does not address or attempt to prescribe court procedure.

Subsection 4 of the statute makes clear that the public policy thus announced was to require evidence to be submitted to the trier of facts if the conduct of the officer seizing the evidence "was taken in a reasonable good faith belief that it was proper." This act was the legislative reaction to recent federal decisions in which a good faith exception to the exclusionary rule was established by judicial decision.

In United States v. Williams, 622 F.2d 830, 840, (5th Cir. 1980) the Fifth Circuit refused to exclude evidence where

> "it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."

The court recognized that the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good faith ones. After an in-depth analysis of the need for a good faith exception to the exclusionary rule, the Williams court held (Reporter, p. 846, 847):

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

The newly enacted Colorado statute adopts this doctrine in statutory form.

The good faith of Officer Freeman in seizing the television set and video game, and in arresting the defendant affirmatively appears in this case. He is a police officer with 21 years experience on the police department. He knew the procedures followed by professional burglars, who usually enter dwellings at a time when the occupants are not home. He was asked why he did not arrest the defendant at once upon arrival at the scene. His answer was:

> "Well, at that time I didn't feel I had probable cause to arrest him for anything.

Q. And why is it that at that time you felt you did not have probable cause.
A. Because -well, because I didn't know where the information was coming from that we had received from the District 3 station that he was possibly a burglar. He was just a man on the street with a T.V. set."

In Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949), this Court stated:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act.

Within the meaning of this quotation, the citizen Mrs. Bergan was qualified as a "reasonable and prudent" person. She had no hesitancy in concluding that a crime had been committed. Upon the basis of what she saw -- "the factual and practical considerations of every day life" -- she called the police to report a crime.

Only after Mrs. Bergan identified herself as the person who had reported to the police the conduct which she believed established the commission of a crime, did Officer Freeman arrest defendant:

> When I saw that I had the person Officer Ortiz was talking to on

> the phone, then I felt I was safe enough to go ahead and place him under arrest.

It is undisputed that before the television and the video game were seized and before the defendant was taken into custody to police headquarters, Mrs. Bergan had made a full report to the police concerning her observation of defendant's actions.

It is apparent from the foregoing that the seizure of the evidence and the arrest of defendant took place under a good faith belief by the arresting officer that he was authorized to do so.

In refusing to apply §16-3-308 to the instant case, the Colorado Supreme Court declared (Reporter, pp. 950-951):

> A "good faith mistake" under the statute consists of "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause." Section 16-3-308 (2)(a). C.R.S. 1973 (1982 Cum. Supp.). The mistake in this case does not center upon a misperception of an existing fact but upon a mistaken judgment of law--that is, the mistaken judgment by the officer that the facts known to him were sufficient to warrant a full custodial arrest of the defendant.

Here, the officer made a judgment regarding probable cause to arrest, i.e.,

that reasonable grounds existed to believe that a crime had been committed and that the defendant committed it. The officer was convinced that he had probable cause to arrest.

The Colorado Supreme Court did not find that the officer had erred with regard to the facts. Rather, the court held that the officer made "a mistaken judgment of law" when he believed the facts to be sufficient to support defendant's arrest.

The People assert that the Colorado Supreme Court's suppression of the evidence in this case conflicts with applicable decisions of this Court pertaining to effectuating Fourth Amendment rights by invoking the exclusionary rule. As the Court declared in United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974):

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> * * *
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:
>
> * * *
>
> In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights

> generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.
> 414 U.S. at 619-620

Even the threshold requirement of standing is not met, because the undisputed evidence is that the items seized from respondent were stolen; and, the circumstances of respondent's possession preclude his having any legitimate expectation of privacy in the stolen property. See Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

Moreover, the facts of this case as stated in the opinion, Exhibit A, are themselves convincing testament against imposing the harsh sanction of suppression. The Calandra court, supra, stated that the exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served." 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561. In the case at bar, the prompt response of police to the concerned citizen's call, the brief questions to respondent which elicited suspicious answers, and the nonviolent arrest of respondent with the goods that he had just stolen do not equate with police conduct that should be deterred. The Colorado Supreme Court's application of the exclusionary rule to suppress the stolen goods, under the

circumstances here, conflicts with decisions of this Court, E.g. United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), where the Court declared:

> Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. 447 U.S. 734, 100 S.Ct. 2445.

Further, the People assert that the Colorado statute's provision for a good faith exception to the exclusionary rule is consistent with, and indeed reflects, this Court's expressed views concerning that rule.

Finally, the People respectfully submit that the state court's suppression of the evidence in this case is not only legally incorrect, but is a mechanistic application of the exclusionary rule which undermines the waning public confidence in the criminal justice system. The public response to the state court's Quintero opinion was substantial, both citizen calls and news media reports. A column in the Sunday edition of The Denver Post has been selected to include here as Appendix E to this petition. The column is a colloquial yet eloquent statement of the commonsense view of the exclusionary rule--a view that counsel

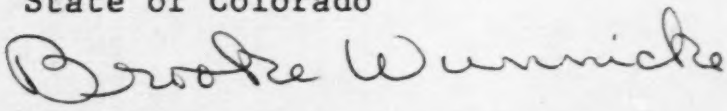
advocates the law can constitutionally share with the public.

In sum, the purpose of the exclusionary rule is to deter willful or flagrant actions by police, not reasonable good-faith police conduct. "Where the reason for the rule ceases, its application must cease also." United States v. Williams, supra.

Petitioner, the People of the State of Colorado, ask this Court to grant certiorari in the case at bar to resolve whether the Fourth Amendment permits the exclusionary rule to be modified when applied to an undisputed good faith seizure of stolen property.

Respectfully submitted,

NORMAN S. EARLY, JR.
District Attorney
Second Judicial District
State of Colorado



/s/ Brooke Wunnicke
BROOKE WUNNICKE
Chief Appellate Deputy District Attorney
(Admitted to this Court on
April 29, 1958)

CERTIFICATE OF SERVICE

I do hereby certify that on the 19th day of April, 1983, I placed in the United States mail, postage prepaid and properly sealed and addressed, a copy of the foregoing Petition for Writ of Certiorari to:

DAVID VELA
Colorado State Public Defender
THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
1575 Sherman Street
Denver, Colorado 80203

Brooke Wunnicke

EXHIBIT "A"

IN THE SUPREME COURT OF COLORADO
NO. 82SA174

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

FIDEL QUINTERO,
Defendant-Appellee.

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER, HONORABLE RAYMOND D. JONES, JUDGE

EN BANC RULING AFFIRMED

Dale Tooley, District Attorney
O. Otto Moore, Assistant District Attorney
Brooke Wunnicke, Chief Appellate Deputy District Attorney
Attorneys for Plaintiff-Appellant

David Vela, Colorado State Public Defender
Thomas M. Van Cleave, III, Deputy State Public Defender
Attorneys for Defendant-Appellee

JUSTICE ERICKSON delivered the Opinion of the Court
JUSTICE ROVIRA dissented and filed opinion

This is an interlocutory appeal by the prosecution from an order suppressing evidence seized incident to the arrest of defendant, Fidel Quintero, and from the order setting aside his conviction of second degree burglary, section 18-4-203, C.R.S. 1973 (1978 Repl. Vol. 8 and 1982 Cum.Supp.), and ordering that the defendant be granted a new trial.

The defendant waived a jury trial and was tried to the court. The court elected to consider the evidence offered at the trial for both the purpose of determining guilt and to resolve the issues relating to the defendant's motion to suppress the evidence that was seized at the time of his arrest. After the court heard the evidence, the court found the defendant guilty of second degree burglary and denied the motion to suppress. Thereafter, when the motion for a new trial was filed, the court granted the motion to suppress and ordered a new trial because of our opinion in People v. Schreyer, 640 P.2d 1147 (Colo. 1982). We affirm.

I.

On September 29, 1981, at 12:45 p.m., Darlene Bergan was sweeping the porch of her

home at 691 South Vine Street in Denver. It was a hot day and the temperature was in the 80 degree range or above that. Darlene Bergan's house is located adjacent to the bus stop at the corner of Exposition and Vine. She saw a man walking on the opposite side of the street and watched him go up on the porch of the house and stand at the front door for approximately twenty seconds, and then saw him stand at the front window so that he could peer into the front of the house for approximately the same amount of time. He then left the porch and proceeded north and appeared to be looking at the windows on the side of the house. He then walked in a northerly direction on Vine Street, stopped at another house, and then could not be seen by Mrs. Bergan. He was wearing a short sleeve shirt and appeared to be watching Mrs. Bergan. She next saw him at 1:45 p.m. while he was standing at a bus stop next to her house. He had taken off his shirt and had used the shirt to cover a television set. He paced nervously and was trying to thumb a ride or hitchhike while waiting for the bus to arrive. Mrs. Bergan thought he looked quite "antsey" and called the police. The

police radio dispatcher reported that a possible burglary suspect was at the corner of Exposition and Vine.

Officer Freeman, a twenty-one year police veteran, was the first to respond and arrived approximately five minutes after the call was made. He asked Quintero for identification and Quintero had none. Other officers who arrived at the scene assisted in the investigation. Quintero claimed that he had bought the television set from someone in the neighborhood for $100 and was trying to go home with it. He was in an undershirt and had brown wool gloves in his back pocket which were found in a "pat down" search for weapons. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). While he was being questioned, Mrs. Bergan made herself known to the officers as the woman who had called the police and reported what she had seen. However, she did not tell the police officers what she had seen before the arrest was made. After Mrs. Bergan identified herself, Quintero was arrested and searched. Under the shirt the police found the television set and a video game. The police also found $140 in cash, f e rings (including two class rings bearing different

initials and class years), and some ladies jewelry in Quintero's pants pockets when he was searched at the police station.

After the arrest was made, the officers checked the neighborhood and were unable to determine that a burglary had occurred. Later that day, however, the owners of a house one block south of Mrs. Bergan's reported that their house had been burglarized and that a television set and a video game had been stolen. The television set and video game that were in the possession of Quintero when he was arrested were identified as the items taken in the burglary. It was approximately five hours after Quintero was arrested that the police learned that the items taken were obtained in the burglary.

II.

Probable cause to arrest exists when the facts and circumstances within an officer's knowledge are sufficient to support a reasonable belief that a crime has been committed by the person arrested. People v. Vigil, 198 Colo. 185, 597 P.2d 567 (1979); People v. Gonzales, 186 Colo. 48, 525 P.2d 1139 (1974); People v. Lucero, 174 Colo. 278,

483 P.2d 968 (1971). Evidence in plain view can be relied upon to establish probable cause. People v. McGahey, 179 Colo. 401, 500 P.2d 977 (1972). The totality of the facts considered as a whole can constitute probable cause even though no one fact, viewed alone, constitutes probable cause. People v. Eichelberger, 620 P.2d 1067 (Colo. 1980).

The arresting officer in this case believed that probable cause existed to arrest Quintero. At the time the arrest was made, the police knew that Quintero was a stranger to the neighborhood, and that he claimed that he had purchased a television set from someone in the neighborhood. They also knew that he had attempted to cover the television set and the video game with his shirt. He had no identification, but no evidence existed to establish that a crime had been committed. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). The police did not learn who the owners of the television set and the video game were until more than five hours after they arrested Quintero. Suspicion does not amount to probable cause and an analysis of the facts requires us to reach the same

conclusion which we reached in People v. Schreyer, 640 P.2d 1147 (Colo. 1982). Moreover, the house where Mrs. Bergan observed Quintero was not the house which was burglarized.

III.

The lack of probable cause to arrest cannot be remedied by resort to the good faith exception or the inevitable discovery rule. The dissenting views of Justice White in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), would craft a good faith exception for the exclusionary rule whenever a police officer reasonably and in good faith believes his conduct comports with existing law. The majority of the United States Supreme Court to date, however, has refused to recognize this good faith exception. See Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). Given such refusal, it would be inappropriate for this court to alter established Fourth Amendment doctrine by approving such an exception at this time.

We recognize that the General Assembly enacted a statute in 1981 which renders evidence admissible when seized as a result

of the "good faith mistake." Section 16-3-308, C.R.S. 1973 (1982 Cum. Supp.). The statutory definition of "the good faith mistake" is narrower than a good faith exception espoused by Justice White. A "good faith mistake" under the statute consists of "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause." Section 16-3-308(2)(a), C.R.S. 1973 (1982 Cum. Supp.). The mistake in this case does not center upon a misperception of an existing fact but upon a mistaken judgment of law -- that is, the mistaken judgment by the officer that the facts known to him were sufficient to warrant a full custodial arrest of the defendant. Thus, section 16-3-308 has no application in this case.

There is no basis in the record for application of the inevitable discovery rule to support the defendant's arrest. The prosecution did not rely upon that rule in imposing the initial suppression motion, nor did it raise the rule in its brief as a basis for reversing the trial court's suppression order. This failure is no doubt attributable to the total lack of concrete evidence in the

record to support the application of the rule to the facts of the case. Indeed, the only reasonable inference from the evidence is that the arresting officer recorded the serial number on the television set after the defendant had been arrested and taken to the station house. In contrast to the fact situation in Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), where an ongoing search for a homicide victim's body had already been in progress and was continuing simultaneously with and independently of the defendant's illegal interrogation, there is no evidence of independent investigatory measures here. The record lacks even a hint of an independent route by which the serial number of the television could have been constitutionally obtained. To remand the case for a hearing under these circumstances would transform the inevitable discovery rule into a vehicle for upholding police conduct based upon an officer's hindsight appraisal of what constitutionally proper course of conduct he "could" have followed. The focus of the inevitable discovery rule should not be upon what the arresting officer "might" or "could"

have done had he not erroneously concluded that probable cause to arrest existed. Rather, the central focus should be on what investigatory measures necessarily or inevitably would have been taken regardless of the officer's decision to arrest.

Accordingly, we affirm the ruling of the trial court suppressing the evidence and ordering that a new trial be granted.

JUSTICE ROVIRA, dissenting:

I respectfully dissent.

The fourth amendment to the United States Constitution assures to the people the right to be secure in their persons, houses, papers and effects, and free from unreasonable searches and seizures. Among other things, this amendment requires that arrests be based upon probable cause--that is, the circumstances must be such as to support a reasonable belief that a crime has been committed by the person arrested. We must not lose sight of the fact that a probable cause determination involves a common-sense question: what would reasonable people believe under the circumstances?

In People v. Weinert, 174 Colo. 71, 74, 482 P.2d 103, 104-05 (1971), we said:

"'[P]robable cause exists where the facts and circumstances within the arresting officers' knowledge are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. In dealing with probable cause, as the very name, implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Lucero v. People, 165 Colo. 315, 438 P.2d 693, cert. den. 393 U.S. 893 [89 S.Ct. 217, 21 L.Ed.2d 173]...."

It is an unfortunate fact, but a fact nonetheless, that a high incidence of residential burglaries is one of the realities of modern urban life. The circumstances surrounding the incident here in question were highly suggestive of a recent burglary. In my view, the officers would have been derelict in their duty had they merely released Quintero. As Justice White observed in his dissenting opinion in Stone v. Powell, 428 U.S. 465, 539, 96 S. Ct. 3037, 3073, 49 L.Ed.2d 1067 (1976):

"Making the arrest in such circumstances is precisely what the community expects the police officer to do. Neither officers nor judges issuing arrest warrants need delay apprehension of the suspect until unquestioned proof

against him has accumulated. The officer may be shirking his duty if he does so."

There is no suggestion here that the officers were not acting in good faith. In fact, one officer testified that after stopping Quintero and questioning him Quintero was not arrested immediately because the police did not feel that they had probable cause. It was only after Mrs. Bergan identified herself as the caller that the defendant was placed under arrest. The information provided by the citizen who lived in the area and who observed the defendant prowling around a neighbor's home, in conjunction with the suspect explanation given by the defendant, caused the police to have sufficient facts to believe that a crime had been committed. See People v. Mathis, 189 Colo. 534, 542 P.2d 1296 (1975); People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971). I cannot conclude that the actions of the police were anything but reasonable under circumstances that warranted the conclusion that an offense had been committed. The fourth amendment requires no more.

Conceding for the sake of argument that

the police officers did not have probable cause to arrest when they did, I would remand to the trial court with directions to consider the applicability of the "inevitable discovery rule" to the facts of this case.

In Brewer v. Williams, 430 U.S. 387, 406-07 n. 12, 97 S. Ct. 1232, 1243 n. 12, 5, L.Ed.2d 424 (1977), the United States Supreme Court, after concluding that statements made by the defendant about the location of a body were unconstitutionally obtained, stated as follows:

> "While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams."

When the case was returned to the state courts, it was determined that given the procedures being used to search for the body the police would have found it in three to five hours without Williams' statement. State v. Williams, 285 N.W.2d 248 (Iowa 1979), cert. denied, 446 U.S. 921 100 S.Ct. 1859, 64 L.Ed.2d 277 (1980).

In adopting the inevitable discovery rule, the Iowa court adopted a two-part test for its application. See W. LaFave, Search and Seizure 11.4 at 620-28 (1978). First, the doctrine may be used only when the police have not acted in bad faith to accelerate the discovery of the evidence. Second, the state must prove that the evidence would have been found without the illegal activity and must prove how it would have been found. The state has the burden of showing these two elements by a preponderance of the evidence.

The New York Court of Appeals has also adopted the rule, emphasizing that literal inevitability of discovery is not required. Rather, what is required is a "very high degree of probability that the evidence in question would have been obtained independently of the tainted source." People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, 230-31, 408 N.Y.S.2d 395, 402 (1978), rev'd on other grounds, 445 U.S. 573, 100 S. Ct. 1371, 63 L.Ed.2d 639 (1980). A number of other courts have also adopted the rule. See, e.g., State v. Phelps, 297 N.W.2d 769 (N.D. 1980); State v. Beede, 119 N.H. 620, 406 A.2d 125 (1979), cert. denied, 445 U.S. 967, 100 S.Ct. 1659, 64 L.Ed.2d 244 (1980); United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980).

Here the trial court suppressed not only the television set, but also any testimony by the police officers concerning the serial number of the set found with Quintero. I believe that on remand the People should be permitted to introduce evidence whether the serial number would have been discovered without the illegal arrest and, if so, how it would have been found.

The application of the exclusionary rule to the facts of this case demonstrates why the rule has come under increasing attack and why courts and legislatures have recognized alternatives such as the "good faith" exception.

In 1981 the Colorado legislature adopted a statute providing that evidence otherwise admissible in criminal proceedings shall not be suppressed if the evidence was seized by the police as a result of a good-faith mistake or of a technical violation. See section 16-3-308, C.R.S. 1973 (1982 Supp. to 1978 Repl. Vol. 8).

The good-faith rule adopted by the Colorado legislature closely follows the views of Justice White in his dissent in Stone v. Powell, supra, where he stated that

the exclusionary rule should be "modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for his belief." See United States v. Williams, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981) (upheld seizure of evidence by officers in good faith and in the reasonable though mistaken belief that they are authorized to do so).

The United States Supreme Court has to date not recognized the good faith exception. See Taylor v. Alabama, ___ U.S. ___, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). However, in Illinois v. Gates, the court requested the parties to address the question whether the exclusionary rule should to any extent be modified, "so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." ___ U.S. ___, 103 S.Ct. 436, 74 L.Ed.2d (1982).

Application of the "good faith" exception has not been foreclosed by a

definitive ruling of the United States Supreme Court. Accordingly, I would apply the "good faith" exception to the case at hand and thus reverse the trial court's order suppressing the evidence which established the defendant's guilt beyond a reasonable doubt.

EXHIBIT "B"

COLORADO APPELLATE RULES 4.1
INTERLOCUTORY APPEALS
IN CRIMINAL CASES

* * * *

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall accompany said opinion.

EXHIBIT "C"

SUPREME COURT, STATE OF COLORADO

NO. 82 SA174

MOTION TO VACATE REMITTITUR

THE PEOPLE OF THE STATE OF COLORADO
Plaintiff-Appellant,

vs.

FIDEL QUINTERO,
Defendant-Appellee.

The People of the State of Colorado, by and through Norman S. Early, Jr., District Attorney within and for the Second Judicial District, and by his duly appointed Deputy, Brooke Wunnicke, and moves to vacate the remittitur ordered in this case on January 31 and received February 2, 1983.

As grounds for this motion, the People allege that:

1. C.A.R. 4.1(g) prohibits a petition for rehearing on interlocutory appeals in criminal cases.

2. The opinion of the Supreme Court of Colorado, issued January 31, 1983, is, therefore, a final judgment.

3. The People of the State of Colorado intend to seek review of that final judgment

by filing a Petition for Writ of Certiorari in the Supreme Court of the United States.

4. This matter should not, therefore, be remitted to the trial court until completion of review by the Supreme Court of the United States.

WHEREFORE, the People ask this court to vacate its order of remittitur in this matter, issued January 31 and received February 2, 1983.

Respectfully submitted February 16, 1983.

NORMAN S. EARLY, JR.
District Attorney
Second Judicial District
State of Colorado

BY: _____
BROOKE WUNNICKE, Reg. No. 4854
Chief Appellate Deputy
District Attorney

924 West Colfax Avenue
Denver, Colorado 80204
Telephone: 575-5933

CERTIFICATE OF MAILING

I do hereby certify that on February 16, 1983, I deposited a true and complete copy of the foregoing Motion to Vacate Remittitur, properly addressed in the U.S. mail to:

THOMAS M. VAN CLEAVE, III, Esq.
1575 Sherman Street
Denver, CO 80203

BROOKE WUNNICKE

_____

EXHIBIT "D"

SUPREME COURT, STATE OF COLORADO

Case No. 82 SA 174

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER

ORDER OF COURT

- -

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

FIDEL QUINTERO,
Defendant-Appellee.

Upon consideration of the Motion to Vacate Remittitur filed by counsel for Plaintiff-Appellant herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motion shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, FEBRUARY 22, 1983

CC: Brooke Wunnicke
Chief Appellate Deputy
District Attorney
West Side Court Building

Thomas M. Van Cleave, III
Deputy State Public Defender

EXHIBIT "E"

DENVER POST
February 6, 1983
Article by Tom Gavin

Burglars Find Friend Indeed

Let me first establish my credentials.

My credentials are that I have a tendency to see things from the underside, having been peering up from there for sometime now. As often as not I side with the black sheep in the flock, the debtor in hock, the prisoner in the dock.

But Jehoshaphat!, what is going on?

Causing this hoo-haw is the Colorado Supreme Court.

The Colorado Supreme Court is acting oddly.

The Colorado Supreme Court has walked off and left its good sense somewhere.

You know me, I try not to criticize judges, not being a candidate for public office. Besides, we who never know when we might be up on charges tend to placate, not upset judges. Judges aren't permitted to read or use a Sony Walkman during a long trial so the choice becomes listening to the evidence or brooding over old slights, and, well, I just don't want to risk it.

But the Colorado Supreme Court seems to have ruled that it isn't cricket to arrest burglars who have not quite gotten out of the neighborhood with the boodle.

And I — The Understanding One, Mr. Permissive, America's Pushover — am in danger of sputtering myself into sick bay.

What happened:

On Sept. 29, 1981, a South Denver woman looked out and saw a stranger peering into a neighbor's windows. She watched as he went to another house, then disappeared from view.

When she next saw him he was standing at a nearby bus stop. He'd removed his shirt and draped it over a video game and a television set he was carrying. He seemed nervous. The resident called police.

RTD service being what it is, the man was still at the bus stop when officers arrived.

The witness came out, identified herself and related what she'd seen. The man insisted he'd purchased the items in the neighborhood, but he was arrested. A jail search produced $140 in cash and jewelry.

Five hours later a burglary report was made. Items reported stolen matched those in the suspect's possession.

Yes, perfect.

Open and shut.

A family's home is burgled while they're away and before they even know it's happened the criminal is behind bars and the loot retrieved.

The very essence of Neighborhood Watch programs.

We all go away feeling fine and even RTD's happy-go-lucky scheduling comes in for a round of applause, right?

You know there are times I wonder about you. You really should begin paying more attention. Happy endings are few in the real world.

Officers, our very own Supreme Court decided, did not have sufficient reason to arrest the burglary suspect, not then knowing conclusively that a burglary had actually occurred. Suspicion, our very own Supreme Court ruled, is not sufficient reason for arrest.

Don't look at me.

One Supreme Court justice disagreed. Only one. His name is Rovira, Luis Rovira.

Residential burglaries are a fact of life, Justice Rovira said, and the circumstances of the incident were highly suggestive of a recent burglary and sufficient to support a reasonable belief that a crime had been committed by the person arrested.

Yes. Indeed.

Quote

"If the police had done anything else, they'd be sharply criticized for dereliction of duty. This is a Catch-22 if I've ever seen one." — Dale Tooley